

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

**APPEAL NO.616 OF 2007
IN
NOTICE OF MOTION NO.1957 OF 2007
IN
SUMMARY SUIT NO.1937 OF 2006**

Mr.Bharat M. Shah	 Appellant
V/s.	
Mr.Abdul Hussain Unnwala & Anr.	
Respondents	

Mr.A.M. Saraogi along with Mr.S.K. Chaurasia for the appellant.

Mr.Cyrus Ardeshir i/by M/s.Pardiwala & Co. for the respondents.

CORAM : SWATANTERKUMAR, C.J.

&

J.P. DEVADHAR, J.

DATED : 19TH NOVEMBER 2007.

P.C. :

The plaintiff / appellant filed a Suit under Order XXXVII of the Code of Civil Procedure, 1908 for recovery of Rs.1,35,000/- with interest. The respondents were granted unconditional leave to defend the suit and the Court held that the suit was not maintainable under the provisions of Order 37 of the Code of Civil Procedure. Thus, the suit was converted into a ordinary suit and was contested by the defendants.

2. During the pendency of the suit, the appellants took out a notice of motion for passing decree on admission as

contemplated under Order 12 Rule 6 of the Code of Civil Procedure. This application was again contested by the defendants and the said motion was declined by order dated 6th August, 2007 passed by the learned Single Judge, giving rise to the present appeal.

3. The correctness of the order is questioned on the ground that there was a clear and unambiguous admission made by the respondents in the written statement and as such the factum of taking loan by the firm having been accepted, the decree on admission ought to have been granted, rather than putting the suit to trial.

4. It is a settled principle of law that where admissions of fact have been made, a decree on admission can be passed. The admission has to be unambiguous, certain and incapable of any confusion. The admission could be made by the parties in the pleadings or any other documents or even on judicial record which could form the basis for passing a decree on admission. According to the appellant, following paragraphs of the written statement constitute an unambiguous, clear and definite admission, entitling the appellant for seeking decree on admission.

“3. It is submitted that Ms.Jayshree Shah is a proper and necessary party to the present suit as the

alleged loan transaction on which the suit is based was in fact brought about at her instance and on the express understanding set out hereinafter. The Plaintiffs are complete and total strangers to the Defendants herein. Admittedly the Plaintiffs have never had any business transaction or dealings in the past. Ms. Jayshree Shah is the only link between the Plaintiffs and the Defendants. Her evidence in the matter is vitally important as also her presence in the suit is absolutely necessary. In effect as will be pointed out hereinafter, the Plaintiffs on the assurances of Ms. Jayshree Shah had granted the loan ostensibly to the 2nd Defendant on which Ms. Jayshree Shah was a partner. However, in reality the said Jayshree Shah was the real recipient of the monies. In effect the Plaintiffs ought to and/or are required to seek necessary reliefs against the said Ms. Jayshree Shah. There was and is an expressed assurance by the said Ms. Jayshree Shah that the aforesaid amount lent was an interest free loan and would be repayable by her only after a period of 5 years. Ms. Jayshree Shah had also assured the firm that since admittedly she had procured the monies she would repay the said amounts to the Plaintiffs. This fact though known to the Plaintiffs has been willfully and purposely suppressed in the Plaint. It is therefore, submitted that Ms. Jayshree Shah is a proper and necessary party and in the absence of the same the suit itself must be dismissed for non joinder of a necessary party.

5. Without prejudice to the aforesaid and assuming for the sake of argument that the amount is returnable to the Plaintiffs it is submitted that the amount was returnable only after a period of 5 years and not at any time prior thereto. The amount was also repayable without interest. It is submitted that this fact has remained undenied to date. It is therefore, submitted that assuming the suit is maintainable, the suit itself as framed is premature and ought to be dismissed with costs."

5. Upon considering the above paragraphs, the learned Single Judge came to the conclusion that there was no clear and

unambiguous admission and the averments made in para 9 is that the amount in receipt is on capital amount and thus being not refundable unless and until the business of the partnership firm was dissolved and account between the parties are settled.

6. We are unable to find any error of law in the impugned order. The purport of passing a decree on admission is on a certain and clear admission, free of any doubt or explanation or conditions attached thereto. The written statement filed by the defendant in the suit specifically disputes that any amount was due to the appellant and in any case even if some amount was due, the same was recoverable from Ms.Jayshree Shah who had not been impleaded as a defendant in the Suit. Apart from taking various objections with regard to maintainability of the suit, the respondent also denied the very liability to repay the said amount, even without interest. The paragraphs afore noticed clearly shows that there is no clear, unambiguous and definite admission on the part of the defendant. They have only added conditions that even if it was presumed that the loan was taken as alleged, the loan was payable only after five years and that too by Ms.Jayshree Shah. The above paragraphs, in our opinion, do not constitute unconditional, unambiguous and definite admission which could form basis for passing of decree on admission as

contemplated under Order XXII Rule 6 of the Code of Civil Procedure.

7. Thus, we find no merits in the appeal. The same is dismissed. Parties to bear their own costs.

8. Appellant is at liberty to approach learned Single Judge for expeditious disposal of the Suit.

CHIEF JUSTICE

J.P. DEVADHAR, J.